PEMBINAAN KOTA LAKSAMANA (MELAKA) SDN BHD & ANOR v. DAMANSARA REALTY BHD

COURT OF APPEAL, PUTRAJAYA
AZIAH ALI FCJ
MOHD HISHAMUDIN YUNUS JCA
LIM YEE LAN JCA
[RAYUAN SIVIL NO: W-02(IM)-1359-06-2013]
4 FEBRUARY 2016

CIVIL PROCEDURE: *Injunction – Interim injunction restraining dealings with property – Undertaking to pay damages caused by grant of injunction – Application to Senior Assistant Registrar ('SAR') to enforce undertaking after injunction dissolved – Quantum of damages – Whether there was admissible evidence adduced to prove losses suffered – Whether legal and evidential burden discharged – Whether SAR applied correct principles on assessment of damages in awarding damages*

DAMAGES: *Assessment – Appeal – Appeal against decision of Senior Assistant Registrar ('SAR') – Interim injunction restraining dealings with property – Undertaking to pay damages caused by grant of injunction – Application to Senior Assistant Registrar ('SAR') to enforce undertaking after injunction dissolved – Quantum of damages – Whether losses suffered proved – Whether legal and evidential burden discharged – Whether SAR applied correct principles on assessment of damages in awarding damages*

The respondent ('the first defendant'), through its subsidiary company known as Tanjung Tuan Hotel Sdn Bhd, entered into a sale and purchase agreement dated 4 December 1995 ('the SPA') to sell a piece of land together with a three storey hotel constructed thereon ('the Regency Hotel') to Puteri Hotel Sdn Bhd (the second defendant at the High Court) at a purchase price of RM50,000,000. The completion date of the purchase was on or about 3 April 1996. However, the appellants ('the plaintiffs') obtained an interim injunction against the first defendant restraining the first defendant, *inter alia*, from selling or in any way dealing with the Regency Hotel. The plaintiffs gave an undertaking to pay any damages that may be caused by the grant of the injunction. The injunction was in force from 29 January 1996 until it was dissolved when the plaintiffs' writ and statement of claim was struck out on 30 September 2004. On 18 September 2006, the first defendant filed an application to the Senior Assistant Registrar ('the SAR') to enforce the undertaking as to damages for the period of the injunction from 29 January 1996 to 30 September 2004. The SAR awarded a sum of RM13 million in damages with interest to the first defendant. The plaintiffs' appeal to the judge in chambers against the decision of the SAR was allowed. The first defendant then appealed to the Court of Appeal. The Court of Appeal allowed the first defendant's appeal in part and ordered that the matter be remitted back to the High Court to hear the plaintiffs' appeal only on the quantum of damages.

The High Court Judge found that there was sufficient documentary evidence *ie*, two valuation reports adduced by the first defendant to prove its losses caused by the grant of the interlocutory injunction which had not been rebutted by the plaintiffs. The first valuation report dated 4 December 1995 ('exh D2') was prepared as the condition precedent to the SPA and valued the Regency Hotel in the region of RM55 million. The second valuation report dated 19 February 2003 ('exh D3') valued the property at RM37 million as at that date. In the premises, the High Court dismissed the plaintiffs' appeal and affirmed the decision of the SAR. The issues that arose for determination were, *inter alia*, (i) whether there was sufficient, cogent and credible evidence adduced by the first defendant before the SAR to prove that the loss suffered by the first defendant attributable to the grant of the interlocutory injunction was in the sum of RM13 million; and (ii) whether the SAR had applied the correct principles on assessment of damages in awarding the said quantum to the first defendant.

Held (allowing appeal with costs)
Per Lim Yee Lan JCA delivering the judgment of the court:

(1) The SAR erred in law and in fact in awarding the sum of RM13 million as damages to the first defendant. The SAR improperly admitted exh. D3 as part of the documentary evidence of the first defendant despite the objection of the plaintiffs. It is trite law that when a document is sought to be admitted as evidence in order to establish the truth of the facts contained in it, the maker has to be called. Exhibit D3 was sought to be admitted to prove the truth of its contents, namely, that the value of the hotel on 19 February 2003 was RM37 million. However, the first defendant merely produced the original of the valuation report through its sole witness, DW1. The first defendant failed to call the maker of the report and did not lead any evidence as to why the maker was not called. Since the first defendant failed to satisfy the conditions laid down in s. 73A for the admission of exh. D3, exh. D3 should not have been admitted. Even if exh. D3 was admissible, it remained as documentary hearsay and had no probative value. (paras 24, 25, 27, 29, 30 & 33)

(2) The SAR failed to take into consideration the trite principle of law that a party claiming damages bears the burden of proving it by adducing cogent and credible evidence. DW1 had, during cross-examination, stated that as at 2003, there was no intention to sell the hotel. If there was no intention to sell, there was no loss sustained by the first defendant. Further, the hotel was never sold in 2004 upon the discharge of the injunction, to enable the first defendant to claim that there was a loss caused by the injunction. DW1 had also admitted that the sum claimed was anticipated loss only. The first defendant could not claim that it had suffered loss just by producing the two valuation reports. (paras 35, 41 & 42)

(3) The first defendant was not a party in the SPA dated 4 December 1995. The SPA was between Tanjung Tuan Hotel Sdn Bhd and Puteri Hotel Sdn Bhd. Although Tanjung Tuan Hotel Sdn Bhd is a subsidiary of the first defendant, there was no document to prove the said relationship between Tanjung Tuan Hotel Sdn Bhd and the first defendant. (para 43)

(4) The documents relied upon by the first defendant to prove its loss consisted of bare assertions and documentary hearsay. In other words, the first defendant had failed to discharge its legal and evidentiary burden in law to prove its actual loss caused by the grant of the injunction. (para 49)

Bahasa Malaysia *Headnotes*

Responden ('defendan pertama'), melalui anak syarikatnya iaitu Tanjung Tuan Hotel Sdn Bhd, telah memeterai perjanjian jual beli bertarikh 4 Disember 1995 ('SPA') untuk menjual sebidang tanah bersama-sama dengan sebuah hotel tiga tingkat yang terbina di atasnya ('Regency Hotel') kepada Puteri Hotel Sdn Bhd (defendan kedua di Mahkamah Tinggi) pada harga belian sebanyak RM50,000,000. Tarikh penyelesaian pembelian tersebut adalah pada atau sekitar 3 April 1996. Walau bagaimanapun, perayu ('plaintif') telah memperoleh injunksi interim terhadap defendan pertama menghalang defendan pertama daripada, antara lain, menjual atau berurusan dengan Regency Hotel. Plaintif telah berjanji untuk membayar apa-apa kerugian yang mungkin disebabkan oleh perintah injunksi tersebut. Perintah tersebut telah berkuat kuasa dari 29 Januari 1996 sehingga dibubarkan apabila writ dan pernyataan tuntutan plaintif ditolak pada 30 September 2004. Pada 18 September 2006, defendan pertama memfailkan permohonan kepada Penolong Kanan Pendaftar ('PKP') untuk menguatkuasakan aku janji ganti rugi bagi tempoh injunksi dari 29 Januari 1996 hingga 30 September 2004. Penolong Kanan Pendaftar mengawardkan sejumlah RM13 juta sebagai ganti rugi dengan faedah kepada defendan PKP dibenarkan. Defendan pertama kemudian mengemukakan rayuan kepada Mahkamah Rayuan. Mahkamah Rayuan membenarkan sebahagian rayuan defendan pertama dan mengarahkan supaya perkara tersebut dirujuk semula ke Mahkamah Tinggi untuk mendengar rayuan plaintif hanya tentang kuantum ganti rugi. Hakim Mahkamah Tinggi mendapati bahawa terdapat keterangan dokumentar yang mencukupi iaitu dua laporan penilaian yang dikemukakan oleh defendan pertama untuk membuktikan kerugian yang disebabkan oleh perintah injunksi interlokutori yang tidak disangkal oleh plaintif. Laporan penilaian pertama bertarikh 4 Disember 1995 ('D2') disediakan sebagai syarat terdahulu kepada SPA dan menilai Regency Hotel dalam lingkungan RM55 juta. Laporan penilaian kedua bertarikh 19 Februari 2003 ('D3') menilai hartanah tersebut pada harga RM37 juta pada tarikh tersebut. Oleh itu, Mahkamah Tinggi menolak rayuan plaintif dan mengesahkan keputusan PKP. Isu-isu yang dibangkitkan untuk penentuan, antara lain, adalah (i) sama ada terdapat keterangan yang cukup, kukuh dan boleh dipercayai oleh

defendan pertama di hadapan PKP untuk membuktikan bahawa kerugian yang dialami defendan pertama disebabkan perintah injunksi interlokutori adalah berjumlah RM13 juta; dan (ii) sama ada PKP menggunakan prinsip yang betul dalam menilai ganti rugi award kuantum kepada defendan pertama.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Lim Yee Lan HMR menyampaikan penghakiman mahkamah:

(1) PKP terkhilaf dari segi undang-undang dan fakta dalam mengawardkan RM13 juta sebagai ganti rugi kepada defendan pertama. PKP dengan tidak wajar telah menerima D3 sebagai sebahagian daripada keterangan dokumentar defendan pertama walaupun dibantah oleh plaintif. Adalah undang-undang mantap bahawa apabila dokumentar dipohon untuk diterima masuk bagi membuktikan kebenaran fakta yang terkandung di dalamnya, pembuat perlu dipanggil. D3 dipohon untuk diterima masuk untuk membuktikan kebenaran yang terkandung di dalamnya, iaitu, bahawa nilai hotel pada 19 Februari 2003 adalah RM37 juta. Walau bagaimanapun, defendan pertama hanya mengemukakan salinan asal laporan penilaian melalui saksi tunggalnya, DW1. Defendan pertama gagal memanggil pembuat laporan dan tidak mengemukakan apa-apa keterangan mengenai kegagalan memanggil pembuat tersebut. Oleh kerana defendan pertama gagal memenuhi syarat yang ditetapkan dalam s. 73A untuk penerimaan D3, D3 tidak sepatutnya diterima. Jika pun D3 diterima, D3 kekal sebagai dokumentar dengar cakap dan tidak mempunyai nilai probatif tinggi.

(2) PKP gagal mengambil kira prinsip mantap undang-undang bahawa pihak yang menuntut ganti rugi menanggung beban pembuktian untuk mengemukakan keterangan jelas dan boleh dipercayai. DW1 telah semasa pemeriksaan balas menyatakan bahawa pada tahun 2003, tiada niat untuk menjual hotel tersebut. Jika tiada niat untuk menjual, tiada kerugian yang dialami oleh defendan pertama. Selanjutnya, hotel tersebut tidak pernah dijual pada tahun 2004 selepas pembatalan injunksi, untuk membolehkan defendan pertama mendakwa bahawa terdapat kerugian yang disebabkan oleh injunksi tersebut. DW1 juga mengaku semasa pemeriksaan balas bahawa jumlah yang dituntut hanya kerugian jangkaan sahaja. Defendan pertama tidak boleh mendakwa telah mengalami kerugian hanya dengan mengemukakan dua laporan penilaian.

(3) Defendan pertama bukan pihak dalam SPA bertarikh 4 Disember 1995. SPA adalah antara Tanjung Tuan Hotel Sdn Bhd dan Puteri Hotel Sdn Bhd. Walaupun Tanjung Tuan Hotel Sdn Bhd adalah anak syarikat defendan pertama, tiada dokumen untuk membuktikan hubungan tersebut antara Tanjung Tuan Hotel Sdn Bhd dan defendan pertama.

(4) Dokumen-dokumen yang disandar oleh defendan pertama untuk membuktikan kerugian terdiri daripada dakwaan kosong dan dokumentar dengar cakap. Dalam erti kata lain, defendan pertama gagal melepaskan beban undang-undang dan keterangan untuk membuktikan kerugian sebenar yang disebabkan oleh perintah injunksi tersebut.

Case(s) referred to:

Air Express Ltd v. Ansett Transport Industries (Operations) Pty Ltd (1981) 33 ALR 578 ***(refd)***

Alliedbank (Malaysia) Bhd v. Yau Jiok Hua [1998] 2 CLJ 33 HC ***(refd)***

Bonham-Carter v. Hyde Park Hotel (1948) 64 TLR 177 ***(refd)***

Fraser & Neave Ltd v. Yeo Hiap Seng Ltd [1989] 1 CLJ 275; [1989] 2 CLJ (Rep) 809 CA ***(refd)***

Goo Sing Kar v. Dato' Lim Ah Chap & Ors [2013] 2 CLJ 936 CA ***(refd)***

GS Gill Sdn Bhd v. Descente, Ltd [2010] 5 CLJ 613 FC ***(refd)***

Lee Sau Kong v. Leow Cheng Chiang [1960] 1 LNS 56 CA ***(refd)***

Sunseekers Pte Ltd v. JSH Joshua [1990] 1 CLJ 1048; [1990] 3 CLJ (Rep) 979 HC ***(refd)***

Tan Geok Khoon & Gerard Francis Robless v. Paya Terubong Estate Sdn Bhd [1987] 1 LNS 79 HC ***(refd)***

Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 73A

For the appellants - Joshua Sambanthan & Deepinder Kaur; M/s David Lingam & Co
For the respondent - Alex De Silva & S Shamalah; M/s Bodipalar Ponnudurai De Silva

[Editor's note: For the High Court judgment, please see Pembinaan Kota Laksamana (Melaka) Sdn Bhd & Anor v. Damansara Realty Bhd & Anor [2013] 1 LNS 536 (overruled).]

Reported by Sandra Gabriel

JUDGMENT

Lim Yee Lan JCA:

Introduction

[1] This is an appeal against the decision of the Kuala Lumpur High Court given on 8 July 2013 which affirmed the decision of the Senior Assistant Registrar (SAR) dated 26 June 2011 in awarding a sum of RM13 million to the respondent as damages pursuant to the appellants' undertaking to pay damages in relation to an interlocutory injunction granted in their favour by the Kuala Lumpur High Court.

[2] For convenience parties will be referred to in this judgment as they were in the High Court.

A **Salient Background Facts**

[3] Briefly, the facts were that the first defendant (Damansara Realty Berhad) through its subsidiary company known as Tanjung Tuan Hotel Sendirian Berhad, entered into a sale and purchase agreement dated 4 December 1995 to sell a piece of land held under PN No. 5, Lot No 5628 B Mukim Si Rusa, Daerah Port Dickson, Negeri Sembilan together with a three storey hotel constructed thereon ("the Regency Hotel") to the second defendant (Puteri Hotel Sdn Bhd) at a purchase price of RM50,000,000 ("the SPA").

C **[4]** The completion date of the purchase pursuant to the SPA was on or about 3 April 1996.

[5] However, on or about 29 January 1996 the plaintiffs obtained an interim injunction against the first defendant restraining the first defendant, *inter alia*, from selling or in any way dealing with the Regency Hotel.

D **[6]** The interim injunction was extended pursuant to an order of court dated 13 January 2003.

[7] In obtaining the injunction, the plaintiffs gave an undertaking to pay any damages that may be caused by the grant of the injunction to the defendants.

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[8] The injunction was in force from 29 January 1996 until it was dissolved when the plaintiffs' writ and statement of claim was struck out on 30 September 2004, on the application of the first defendant.

[9] On 18 September 2006 the first defendant filed an application to the F SAR of the Kuala Lumpur High Court to enforce the undertaking as to damages for the period of the injunction from 29 January 1996 to 30 September 2004.

[10] Upon conclusion of the enquiry into damages, the learned SAR awarded a sum of RM13 million damages with interest to the first defendant.

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[11] The plaintiffs appealed to the judge in chambers against the decision of the SAR which was allowed by the High Court Judge.

[12] The first defendant then appealed to the Court of Appeal which allowed the appeal in part and ordered that the matter be remitted back to H the High Court for a judge to hear the plaintiffs' appeal only on the quantum of damages.

High Court's Decision

[13] The High Court to whom the matter was remitted upon hearing the I parties dismissed the appellants' appeal and affirmed the decision of the SAR dated 29 June 2011.

[14] In the course of arriving at her decision, the learned High Court Judge referred to a number of decided authorities on principles of assessment of damages (see: *Tan Geok Khoon & Gerard Francis Robless v. Paya Terubong Estate Sdn Bhd* [1987] 1 LNS 79, *Fraser & Neave Ltd v. Yeo Hiap Seng Ltd* [1989] 1 CLJ 275; [1989] 2 CLJ (Rep) 809; *Sunseekers Pte Ltd v. JSH Joshua* [1990] 1 CLJ 1048; [1990] 3 CLJ (Rep) 979; *Air Express Ltd v. Ansett Transport Industries (Operations) Pty Ltd* (1981) 33 ALR 578 and *Goo Sing Kar v. Dato' Lim Ah Chap & Ors* [2013] 2 CLJ 936) and came to the conclusion that the plaintiffs had failed to demonstrate to the court that the learned SAR's decision was made based on the wrong principles of law and on entirely erroneous estimate of damages. On the contrary, she was satisfied that the learned SAR had properly considered the evidence and the record did not disclose any error of law, perverse findings of fact or generally any findings which went against the weight of the evidence adduced before him.

[15] In particular, the learned High Court Judge found that there was sufficient documentary evidence in the form of two valuation reports adduced by the first defendant to prove its losses caused by the grant of the interlocutory injunction which had not been rebutted by the plaintiffs.

[16] The first valuation report dated 4 December 1995 (exh. D2) was prepared as part of the condition precedent to the SPA and valued the Regency Hotel in the region of RM55 million. The second valuation report dated 19 February 2003 (exh. D3) valued the property at RM37 million as at that date. The learned High Court Judge observed that, on the other hand, the plaintiffs failed to produce any valuation report to contradict the two reports.

[17] In the premises the appeal was dismissed with costs of RM10,000 to the respondent.

Appeal

[18] The present appeal by the plaintiffs before us was against the dismissal of the plaintiffs' appeal by the learned High Court Judge.

This Court's Decision

[19] On 21 January 2014, by a unanimous decision we allowed the appeal with costs. We now set out the grounds for our decision.

General Principles Applicable To Proof Of Damages

[20] It is trite law that a party claiming damages bears the burden of proving the fact and quantum of damages suffered. This was made clear by the Supreme Court in *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15 in which Edgar Joseph Jr FCJ, speaking for the Supreme Court, held at p. 20 paragraphs b-f, as follows:

> Firstly, that part of the judgment of the Judge which provides that the Vendor shall pay to the purchaser damages to be assessed for wrongful termination of the Agreement with costs and that Tan Sri Khoo and the

vendor shall pay to the purchaser damages to be assessed for breaches of the undertakings, even though affirmed on appeal, can in no way relieve the purchaser of satisfying the fundamental requirement of having to prove its loss (if any) arising from those breaches. To hold otherwise would amount to dispensing with proof of quantum altogether, and that cannot be the law. In so saying, we are reminded of the words of Lord Goddard's *dictum* in *Bonham-Carter v. Hyde Park Hotel* 64, TLR 177, 178:

> ... plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying "This is what I have lost. I ask you to give me these damages". They have to prove it.

This *dictum* was referred to and applied by our Court of Appeal in *John v. Dharmaratnam* [1962] MLJ 187.

And, in *Popular Industries Limited v. Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360, the Court had the occasion to say this (at p. 367):

> It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover the damages. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract (see *Marzetti v. William*). And, where damage is shown but its amount is not proved sufficiently or at all, the Court will usually decree nominal damages. See, for example *Dixon v. Devendge* and *Twyman v. Knowles*.

> In *Malaysian Rubber Development CorporationBhd v. Glove Seal Sdn. Bhd.* [1994] 3 MLJ 569, at 582 E, Mohd Dzaiddin, SCJ, speaking for the Supreme Court, quoted with approval, the above passage in the *Popular Industries* case.

Specific Principle Applicable In Relation To An Undertaking To Pay Damages

[21] The principle relating to assessment of damages pursuant to an undertaking given by a successful applicant for an interlocutory injunction granted by the court which is subsequently set aside has been laid down by the Federal Court in the case of *GS Gill Sdn Bhd v. Descente, Ltd* [2010] 5 CLJ 613 at p. 631 paragraphs E-H in the following manner:

> The law was stated by Lloyd LJ (with whom Stocker LJ and Sir George Waller agreed) in *Financiera Avenida v. Shiblaq*, 7 November 1990, thus:
>
> > Two questions arise whenever there is an application by the defendant to enforce a cross-undertaking in damages. The first question is whether the undertaking ought to be enforced at all. This depends on the circumstances in which the injunction was obtained, the success or otherwise of the plaintiff at the trial, the subsequent conduct of the defendant and all the other

> circumstances of the case. It is essentially a question of discretion. … *If the first question is answered in favour of the defendant, the second question is whether the defendant has suffered any damage by reason of the granting of the injunction. Here the ordinary law of contract applies both as to causation and to quantum: see F Hoffmann-La Roche & Co A.G. v. Secretary of State for Trade and Industry [1975] AC 295 per Lord Diplock, at p. 361*. (emphasis added)

Our Findings

[22] In this case, we observed that the only question before the High Court was whether there was sufficient cogent and credible evidence adduced by the first defendant before the SAR that the loss suffered by the first defendant attributable to the grant of the interlocutory injunction was in the sum of RM13 million and whether the learned SAR had applied the correct principles on assessment of damages in awarding the said quantum to the first defendant.

[23] As stated earlier, in dismissing the plaintiffs' appeal the learned High Court Judge in her grounds of judgment had answered the two questions in the affirmative.

[24] On our part, having considered the submission of respective learned counsel and perused the evidence on the record, we are unable to agree with the learned High Court Judge's findings. We are of the opinion that the SAR erred in law and in fact in awarding the sum of RM13 million as damages to the first defendant on two counts.

[25] The first error on the part of the learned SAR relates to his improper admission of exh. D3 as part of the documentary evidence of the first defendant despite the objection of the plaintiffs.

[26] Exhibit D3 was a valuation report dated 19 February 2003 prepared by Colliers, Jorden Lee and Jaafar. D3 was admitted through the sole witness for the first defendant, DW1, who was the assistant general manager of the first defendant appointed in January 1999.

[27] We are in entire agreement with learned counsel for the plaintiffs that it is trite law that when a document was sought to be admitted as evidence in order to establish the truth of the facts contained in it, the maker has to be called (see: *Alliedbank (Malaysia) Bhd v. Yau Jiok Hua* [1998] 2 CLJ 33; [1998] 6 MLJ 1).

[28] Nevertheless, a party seeking to adduce a document in order to prove the truth of its contents without calling the maker can resort to the exception specified in s. 73A of the Evidence Act 1950, on condition that he satisfies the conditions laid down therein. Section 73A reads as follows:

> 73A. Any statement made by a person in a document and tending to establish that fact shall on production of the original document be admissible as evidence of that fact if the following conditions are satisfied:

A (a) if the maker of the statement either

(i) has personal knowledge of the matters dealt with by the statement; or (the sole witness of the Respondent - DW1 had no personel knowledge of the documents)

B (ii) where the document in question is or forms part of a documents purporting to be continuous record; and (DW1 was not in the employ of the Respondent when exhibit was prepared)

(b) if the maker of the statement is called as a witness in the proceedings.

C **[29]** In this case, it was obvious that D3 was sought to be admitted to prove the truth of its contents, namely, that the value of the hotel on 19 February 2003 was RM37 million.

[30] However, the evidence showed that the first defendant merely produced the original of the valuation report through its sole witness, DW1. D Exhibit D3 was prepared by Colliers, Jordan Lee and Jaafar and the first defendant could have easily called the maker of the report but did not do so. During the enquiry, the first defendant did not lead any evidence as to why the maker was not called nor the whereabouts of the maker of the report.

[31] DW1 admitted during cross-examination that he had no personal E knowledge of exh. D3 as he joined the first defendant only in 1999 and the report was prepared in 1995. DW1 admitted that he would not be able to answer any question on the contents of exh. D3 "as he did not know how they came about the value".

[32] It is our opinion that since the first defendant had failed to satisfy the F conditions laid down in s. 73A for the admission of D3, exh. D3 should not have been admitted since the maker was not called.

[33] Even if the said exh. D3 was admissible, it remained as documentary hearsay and had no probative value to assist the first defendant in proving that the value of the hotel on 19 February 2003 was RM37 million.

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[34] Consequently we agreed with learned counsel for the plaintiffs that exh. D3 which was sought to be admitted to prove the truth of its contents, ie that the value of the property as at 19 February 2003 was RM37 million was hearsay evidence and was wrongly admitted by the learned SAR.

H **[35]** The second error committed by the learned SAR was that in assessing the damages allegedly suffered by the first defendant caused by the grant of the interim injunction, the learned SAR failed to take into consideration the trite principle of law discussed above that a party claiming substantial damages bears the burden of proving it by adducing cogent and credible I evidence.

[36] In this instant case the first defendant claims that it was unable to sell the Regency Hotel during the period of the injunction and was able to sell only in 2008.

[37] In an attempt to discharge its burden of proving its actual loss, the first defendant sought to adduce the two aforementioned valuation reports, of which the makers were not called and hence remained as documentary hearsay, to show that its loss was RM13 million. It is clear that the sum of RM13 million represents the difference in the alleged value of the property in December 1995 and February 2003 as stated in the two aforementioned reports.

[38] It would appear that the learned SAR was persuaded by the contention of the first defendant during the enquiry that the loss suffered by the first defendant could be determined by simply calculating the difference in the value of the hotel in December 1995 (RM50 million as per the purchase price) and its value in February 2003 (RM37 million as stated in exh. D3).

[39] In other words, the learned SAR's assessment of the loss allegedly suffered by the first defendant was an arithmetical calculation of the difference in the value of hotel in 1995 and its value in 2003.

[40] In this regard, we accept the following contention of the plaintiffs that the learned SAR erred on principle in so doing.

[41] DW1 had during cross-examination stated that as at 2003 there was no intention to sell the hotel. If there was no intention to sell how could there be a loss sustained by the first defendant.

[42] Further, the hotel was never sold in 2004 upon the discharge of the injunction, to enable the first defendant to claim that there was a loss caused by the injunction. The first defendant cannot claim that it has suffered loss just by producing the two valuation reports. DW1 had also admitted during cross-examination that the sum claimed was anticipated loss only.

[43] Furthermore and most importantly the first defendant was not a party in the SPA dated 4 December 1995. The said SPA was between Tanjung Tuan Hotel Sendirian Berhad and the second defendant, Puteri Hotels Sdn Bhd. DW1 had testified that Tanjung Tuan Hotel Sendirian Berhad is a subsidiary of the first defendant but there was no document to prove the said relationship between Tanjung Tuan Hotel Sendirian Berhad and the first defendant.

[44] DW1 had relied on exhs. D4 and D5 (independent advice circulars to shareholders) to show that the sale would give rise to an extraordinary gain of RMs10 million and that as Tanjung Tuan Hotel Sendirian Berhad was a subsidiary of the first defendant, it would benefit from the sale. However, exhs. D4 and D5 by themselves could not prove that the sale of the hotel would give rise to an extraordinary gain of RM10 million.

[45] DW1 had testified that the injunction was lifted on 30 September 2004 and that because of the injunction the first defendant could not sell the hotel to the second defendant at RM50 million and could do so only in 2004. This was erroneous because the first defendant did not sell the hotel in 2004.

[46] There was no valuation of the hotel as at 30 September 2004, the date the injunction was dissolved. The first defendant was relying on the valuation report dated 19 February 2003 (D3) which was done more than a year before the date of the dissolution of the injunction.

[47] The undisputed evidence also showed that the property which compromises of the hotel was sold only in 2008. The first defendant however led no evidence in respect of the sale in 2008.

[48] The undisputed fact also showed that the first defendant was running the hotel through a company called RIH Services Sdn Bhd during the period covered by the interlocutory injunction. However, the first defendant did not produce any statement of account to show the profit or loss generated during this period. The first defendant was in possession of the hotel and operating it through a company and possibly reaping benefits from it and yet claims it had suffered loss of RM13,000,000.

[49] In summary, from an analysis of the entirety of the evidence adduced by the first defendant before the learned SAR during the enquiry as outlined above, it could be seen that the documents relied upon by the first defendant to prove its loss consisted of bare assertions and documentary hearsay In other words, the first defendant had failed to discharge its legal and evidentiary burden in law to prove its actual loss caused by the grant of the injunction.

[50] As was stated by Lord Goddard in his oft-quoted *dictum* in *Bonham-Carter v. Hyde Park Hotel Ltd* (1948) 64 TLR 177 which was followed by Thomson CJ in the case of *Lee Sau Kong v. Leow Cheng Chiang* [1960] 1 LNS 56; [1961] 1 MLJ 17 and Edgar Joseph Jr FCJ in *Tan Sri Khoo Teck Puat*, it is just not sufficient for the first defendant to throw the two valuation reports at the head of the learned SAR and said "this is the loss we have suffered as a result of the injunction enforced against us; I ask you to give us these damages". The first defendant must prove its loss.

[51] As was also decided in *Tan Sri Khoo Teck Puat* and *Popular Industries Limited*, a party claiming substantial damages who failed to prove the quantum of its claim is entitled to nominal damages only.

[52] In view of our findings above, we are of the opinion 'that the learned High Court Judge had erred in law and in fact in coming to a conclusion that the learned SAR has properly considered the evidence and the record did not disclose any error of law and perverse finding of fact or generally any findings which went against weight of the evidence adduced before him.

[53] For the above reasons, we allowed the appeal and set aside the orders of the learned SAR and the High Court Judge and awarded the sum of RM10,000 as nominal damages to the first defendant.

[54] We also awarded the sum of RM25,000 as the agreed costs for this appeal and the appeal at the High Court to the plaintiffs and deposit was refunded to the plaintiffs.